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Persecution Restitution

REMOVING THE JURISDICTIONAL ROADBLOCKS TO TORTURE VICTIM PROTECTION ACT CLAIMS

INTRODUCTION

In 2012, on the route from Damascus to Aleppo, Noura Al-Jizawi was ripped from a bus by armed men who held a gun to her chest and threw her into a waiting car.¹ For more than a month, Al-Jizawi's family was unaware that she had been kidnapped by Syrian forces and was being held in solitary confinement at a government prison authorized by Syria's President Bashar al-Assad.² While detained, Al-Jizawi endured unimaginable acts of torture at the hands of her captors.³ Al-Jizawi was whipped by wire cords, electrocuted, burned, hung by her feet, and had her body stretched and distorted by a "German Chair."⁴ When she was not being tortured, Al-Jizawi was forced to watch others suffer from similarly horrific treatment.⁵ While the prisoners were not fed often, when they were, prison guards threw food that was frequently contaminated with hair and urine at the detainees, who were forced to eat from the floor without utensils.⁶

Al-Jizawi's experiences during the Syrian civil war are not uncommon, as a report from Amnesty International estimates that at least seventeen thousand people have been killed in

¹ Noreen Ahmed-Ullah, *Scholar-at-Risk: U of T's Noura Al-Jizawi, A Key Player in the Syrian Uprising, Became an Opposition Leader*, U OF T NEWS (Sept. 26, 2017), <https://www.utoronto.ca/news/scholar-risk-u-t-s-noura-al-jizawi-key-player-syrian-uprising-became-opposition-leader> [https://perma.cc/P48S-CKGH]; Hollie McKay, *Syrians Describe Torture Inside Assad Prisons: 'Death is Much Better Than This'*, FOX NEWS (Sept. 26, 2017), <https://www.foxnews.com/world/syrians-describe-torture-inside-assad-prisons-death-is-much-better-than-this> [https://perma.cc/T7SS-HDY9].

² Ahmed-Ullah, *supra* note 1; McKay, *supra* note 1.

³ Ahmed-Ullah, *supra* note 1.

⁴ *Id.*; McKay, *supra* note 1. The "German Chair" is a seat that can be shifted so that victims' bodies are stretched and left with permanent injuries. Josh Robbins, *Seven Isis Torture Methods Revealed Include the 'Flying Carpet' and the 'German Chair'*, INT'L BUS. TIMES (Aug. 16, 2017, 5:20 PM BST), <https://www.ibtimes.co.uk/seven-isis-torture-methods-revealed-include-flying-carpet-german-chair-1635289> [https://perma.cc/CN4T-SYBJ].

⁵ Ahmed-Ullah, *supra* note 1.

⁶ McKay, *supra* note 1.

Syrian prisons since 2011.⁷ In fact, members of Al-Jizawi's immediate family, along with sixty-five thousand other people, have been arrested by al-Assad's government forces.⁸ Guards at these prisons beat, shock, burn, rape and otherwise physically torture prisoners.⁹ In rooms of less than one-hundred square feet, there may be more than fifty people who must compete for space and air.¹⁰ Cells are so small that some released detainees have reported that they would want to get beaten so they "could [leave the cell] and breathe" because "[t]he punishment was easier than the smell, and the atmosphere."¹¹ The lack of medical care within the prisons contributes to more suffering and death.¹² Reports of doctors ignoring prisoners' medical conditions, guards soaking wounds to increase the chance the wounds get infected, and intentional infliction of mental anguish are all commonplace in the torture camps.¹³

While the heinous acts described above are offensive to humanity, it is not clear that the victims will ever achieve justice against their captors and their leaders. As one might imagine, Syrian courts, especially while under the control and influence of the al-Assad regime, are not a sympathetic or realistic forum for victims who wish to assert their claims of torture.¹⁴ For most victims, the lack of access to local courts will be enough to prevent them from ever bringing claims, but some Syrians have turned to European courts for relief.¹⁵

Still, others may seek justice in the United States under the Torture Victim Protection Act of 1991 (TVPA), which provides federal courts with subject matter jurisdiction over extraterritorial torture claims.¹⁶ Asserting a TVPA claim,

⁷ *The Horror of Syria's Torture Prisons*, AMNESTY INT'L UK (Feb. 16, 2017, 10:11 AM), <https://www.amnesty.org.uk/horror-syrias-torture-prisons> [<https://perma.cc/L8YS-4RHJ>].

⁸ *Id.*; Ahmed-Ullah, *supra* note 1.

⁹ *The Horror of Syria's Torture Prisons*, *supra* note 7.

¹⁰ *See id.*

¹¹ Priyanka Motaparthi & Nadim Houry, *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities*, HUMAN RIGHTS WATCH (Dec. 16, 2015) (alteration in original) (internal quotation marks omitted) (citing Human Rights Watch interview with Mundhar, Turkey, June 14, 2015), <https://www.hrw.org/report/2015/12/16/if-dead-could-speak/mass-deaths-and-torture-syrias-detention-facilities> [<https://perma.cc/FC5G-8AYX>].

¹² *Id.*

¹³ *Id.*

¹⁴ Suddaf Chaudry, *Syria's Justice System: 'Working Without a Written Law,'* ARAB WKLY (Oct. 12, 2017), <https://thearabweekly.com/syrias-justice-system-working-without-written-law> [<https://perma.cc/5QP9-R2KN>].

¹⁵ Deborah Amos, *With Syria's War Nearly Over, Victims Take the Battle to European Courts*, NAT'L PUB. RADIO (Aug. 13, 2018, 5:06 AM ET), <https://www.npr.org/2018/08/13/637093319/with-syrias-war-nearly-over-victims-take-the-battle-to-european-courts> [<https://perma.cc/BSM7-YT52>].

¹⁶ Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

however, may be impossible because establishing personal jurisdiction in this context is difficult. Even if the victims were to apply Rule 4(k)(2) of the Federal Rules of Civil Procedure, which sometimes provides personal jurisdiction over foreign defendants, the contacts that the potential defendants have with the United States are likely insufficient to establish personal jurisdiction.¹⁷ Thus, it is likely that, despite acts that fall squarely within the purview of the TVPA, these human rights offenders will escape both criminal and civil liability.

This note argues that the TVPA is unable to serve its intended purpose of creating a civil remedy for those who suffer from human rights violations at the hands of foreign defendants because those defendants will rarely be subject to the jurisdiction of United States courts. Without jurisdiction, the TVPA becomes toothless and unenforceable, leaving victims of torture without recourse or redress. If the legislative branch of the federal government truly believes that it is the United States' responsibility to hold torturers accountable, the judicial and legislative branches must create an easier route for establishing personal jurisdiction over foreign defendants. Expanding the reach of Rule 4(k)(2) to provide a constitutional carve out would allow torture victims to seek justice even if their offenders lacked the requisite contacts with the United States.

This note proceeds in the following four parts. Part I of this note outlines the history, purpose, and elements of the TVPA with examples from case law. Part II reviews the requirements for establishing personal jurisdiction with an emphasis on foreign defendants. Part III surveys a variety of potential solutions that could cure deficiencies when applying the TVPA. Finally, Part IV advocates that rewriting Rule 4(k)(2) of the Federal Rules of Civil Procedure to provide a constitutional carve out would best solve the jurisdictional problem when applying the TVPA.

I. HISTORY AND PURPOSE OF THE TVPA

A. *Passing the TVPA and its Legislative History*

Senator Arlen Specter first introduced the TVPA on June 6, 1986.¹⁸ After many hearings, reintroductions, and favorable votes, the TVPA was enacted on March 12, 1992 during the Second

¹⁷ FED. R. CIV. P. 4(k)(2); *see also* *Fraser v. Smith*, 594 F.3d 842, 849–50 (11th Cir. 2010) (discussing contacts required to assert jurisdiction under Rule 4(k)(2)).

¹⁸ S. REP. NO. 102-249, at 2 (1991).

Session of the 102nd Congress.¹⁹ Before voting to confirm the bill, legislators considered the intent of the proposed bill. Specifically, the Senate Judiciary Committee's report indicated that the "legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,"²⁰ which was ratified by the U.S. Senate on October 27, 1990.²¹ The committee outlined the need for legislation by stating that "[o]fficial torture and summary execution violate standards accepted by virtually every nation. This universal consensus condemning these practices has assumed the status of customary international law."²² The committee then contrasted these condemnations with current practices in many nations who "still engage in or tolerate torture."²³

To justify the applicability of the TVPA with regards to extraterritorial actions, the committee indicated that those nations who allow, promote, or engage in torture are the same nations that do not "adhere[] to the rule of law" and therefore do not provide adequate remedies for victims.²⁴ In conjunction with the Alien Tort Claims Act, which was enacted in 1789,²⁵ federal district courts would be able to hear TVPA cases by "establish[ing] an unambiguous basis for a cause of action that has been successfully maintained under an existing law."²⁶ The committee also made clear that the TVPA would establish remedies for aliens and U.S. citizens, unlike the ATCA, which was only available for use by aliens.²⁷

The committee report went on to explain various elements and requirements that must be present for a successful TVPA claim.²⁸ The most important part of the "Analysis of Legislation" is found in the "Who can be sued" section of the report.²⁹ The first

¹⁹ See *id.* at 2–3 (1991); TVPA, 106 Stat. 73. The bill was reintroduced in 1987 and 1989 and on June 22, 1990, the Subcommittee on Immigration and Refugee Affairs held a hearing regarding the legislation. S. REP. NO. 102-249, at 2 (1991). On July 19, 1990, the subcommittee voted favorably 2-1. *Id.* On January 31, 1991, Senator Specter again reintroduced the bill and the Senate Judiciary Committee favorably voice voted. *Id.* at 2–3.

²⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Apr. 18, 1988, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. The Convention recounts the evolution of war before claiming that "the prohibition of torture and inhuman treatment or punishment has been established as a standard for the protection for all persons, in time of peace as well as war." S. TREATY DOC. NO. 100-20, at 1.

²¹ S. REP. NO. 102-249, at 3 (1991).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 3–4.

²⁵ Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2012 & Supp. V 2018)).

²⁶ S. REP. NO. 102-249, at 4 (1991).

²⁷ *Id.* at 5 ("[W]hile the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.").

²⁸ *Id.* at 6–11.

²⁹ *Id.* at 6–8.

sentence of the section provides that a United States court must have personal jurisdiction over a defendant in order for that defendant to be sued.³⁰ Next, the report clarifies that the Foreign Sovereign Immunities Act of 1976 (FSIA)³¹ is still valid and the TVPA applies only to “individuals,” which does not include foreign states or their entities.³² FSIA will not, however, provide a defense for a former official in a TVPA claim.³³ Similarly, a defendant would not be able to assert an “act of state” defense, because every state is formally against torture and therefore no act of torture could ever be considered an act of public policy.³⁴ Taken together, a defendant in a TVPA claim must be an individual—and not a state or its entity—over whom a U.S. court can exercise jurisdiction.

The report also included the minority views of Senator Alan Simpson and Senator Chuck Grassley who, despite condemning torture around the globe, believed that the proposed legislation was “not an appropriate way to remedy foreign acts of torture.”³⁵ First, the minority argued that the bill “[was] in tension with the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”³⁶ Namely, the convention required every country to provide a remedy for torture, so the TVPA’s extraterritorial application seemed to violate the United Nations treaty.³⁷ Second, the minority argued that Congress did not have the authority to create a private right of action for events that took place abroad.³⁸ Third, there was a *forum non conveniens* argument that parties should not have their dispute adjudicated in a location that required logistical problems of subpoenaing witnesses and moving evidence.³⁹ Lastly, the minority who opposed the bill pointed to the potential for a foreign policy problem, an issue that the executive branch raised, by allowing an alien to have “a foreign nation judged by a U.S. court.”⁴⁰ This, the minority argued, could lead to hostile foreign nations retaliating against U.S. citizens.⁴¹

³⁰ *Id.* at 7.

³¹ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. § 1330 (2012)).

³² S. REP. No. 102-249, at 7 (1991).

³³ *Id.* at 8.

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ *Id.*

³⁷ *Id.*; see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Apr. 18, 1988, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 116 (“Each State Party shall ensure . . . that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. . . . In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.”).

³⁸ S. REP. No. 102-249, at 14 (1991).

³⁹ *Id.*

⁴⁰ *Id.* at 15.

⁴¹ *Id.*

Despite the minority's opposition, Congress passed the TVPA, and it has been in effect for twenty seven years.⁴² Thus, Congress, through the TVPA, empowered federal courts to exercise subject matter jurisdiction over cases involving extrajudicial killings or torture.

B. Elements of a TVPA Claim with Examples

Though the TVPA only allows for civil remedies for either torture or extrajudicial killing, the statute has the potential to be powerful because of its extraterritorial application.⁴³ The TVPA defines two actionable torts.⁴⁴ First, it provides a cause of action for an "individual's legal representative, or to any person who may be a claimant in an action for wrongful death" when a person has died due to an "extrajudicial killing."⁴⁵ The statute defines an extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁴⁶ An extrajudicial killing however, "does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."⁴⁷

Second, in addition to providing a cause of action for one's legal representative when the represented person is killed extrajudicially, the statute also allows individuals to recover damages in a civil suit for torture.⁴⁸ The statute defines torture as:

(1) . . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

⁴² Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

⁴³ See *Human Rights*, in BENCHBOOK ON INTERNATIONAL LAW at III.E-28 (Am. Soc'y Int'l L., Diane Marie Amann ed., 2014), https://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf [<https://perma.cc/PJ94-GZ54>].

⁴⁴ TVPA 106 Stat. 73.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁴⁹

Though the definitions are thorough, courts have been forced to decide whether acts fit within the non-exhaustive framework of the statute. In *Mehinovic v. Vuckovic*, for example, where an officer beat the plaintiffs with kicks and blows to the face and genitals and pulled teeth, the United States District Court for the Northern District of Georgia held that the officer's actions fit within the TVPA definition of torture because the beatings caused severe pain and suffering.⁵⁰ Similarly, in *Daliberti v. Republic of Iraq*, the United States District Court for the District of Columbia held that leaving individuals in cells alone without water or beds for days and threatening electrocution by attaching a wire to a man's testicles constituted torture.⁵¹ The court reasoned that such deprivations of basic human necessities fulfilled the definition of torture.⁵² While these two cases illustrate the types of actions that the TVPA condemns, unfortunately, TVPA claims are frequently dismissed on jurisdictional grounds.⁵³

In other cases, courts have denied defining certain actions as torture. For instance, in *Simpson v. Socialist People's Libyan Arab Jamahiriya*, the Circuit Court for the District of Columbia declined to hold that a cruise ship passenger who was "interrogated and then held incommunicado, threatened with death . . . if [she] moved from the quarters [where she was] held, and forcibly separated from her husband . . . [and unable] to learn of his welfare

⁴⁹ *Id.* at 73–74.

⁵⁰ *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345–47 (N.D. Ga. 2002). Specifically, the court noted, "[t]hese beatings included kicks and blows to the face, genitals . . . [defendants] disfigured [plaintiff] and may have broken his ribs and caused him nearly to lose consciousness and to be unable to eat." *Id.* at 1345.

⁵¹ *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 45 (D.D.C. 2000).

⁵² *Id.*

⁵³ See discussion *infra* Section II.A.

or his whereabouts” had suffered from torture.⁵⁴ In *Mohammed v. Bin Tarraf*, allegations of “threats, harassment, discriminatory treatment, confiscation of . . . property, and imprisonment” were, without pointing to specific instances of mistreatment, not enough to satisfy the TVPA torture definition.⁵⁵ Similarly, pushing, shoving, and hair pulling during an eight-hour detention in *Aldana v. Del Monte Fresh Produce* fell short of torture.⁵⁶

In addition to requiring that a plaintiff sufficiently plead and prove “torture,” the TVPA places other limitations on opportunities for recovery.⁵⁷ For a claim to be actionable, the torture must be carried out by “[a]n individual who acts, under actual or apparent authority, or color of law, of any foreign nation.”⁵⁸ In 2012, the United States Supreme Court, after employing the “ordinary meaning” of the word “individual” and examining Congress’ intent, held that the TVPA applied only to “natural persons.”⁵⁹ The Court opined that the limitation Congress placed on the scope and enforceability of the statute by intending a narrow definition of “individual” was an intention that the Court must respect.⁶⁰

To satisfy the TVPA’s color of law requirement, courts conduct an agency analysis and consider “jurisprudence under 42 U.S.C. § 1983.”⁶¹ “Under those principles, ‘[f]or the purposes of the TVPA, an individual acts under color of law . . . when he acts together with state officials or with significant state aid.’”⁶² For example, allegations that a mayor participated in armed aggression by a private security force against labor unionists in Guatemala satisfied the TVPA’s color of law requirement.⁶³ In contrast, where a corporation’s subsidiary was accused of using paramilitary forces to torture unions leaders, the United States Court of Appeals for the Eleventh Circuit held that the paramilitary group was not acting under the color of law unless the plaintiffs could prove that there was a symbiotic relationship

⁵⁴ *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (internal quotation marks omitted) (alterations in original).

⁵⁵ *Mohammad v. Bin Tarraf*, 300 F. App’x 87, 89 (2d Cir. 2008).

⁵⁶ *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252–53 (11th Cir. 2005) (per curiam).

⁵⁷ Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

⁵⁸ *Id.*

⁵⁹ *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012).

⁶⁰ *Id.* at 459.

⁶¹ *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 52 (2d Cir. 2014) (quoting *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)).

⁶² *Id.* at 52–53 (alterations in original) (quoting *Klulamani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam)).

⁶³ *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248–50 (11th Cir. 2005) (per curiam).

between that group and the military or government.⁶⁴ Lastly, the alleged offenders must be acting under the authority of “any foreign nation,” which eliminates the possibility of asserting a TVPA claim against any United States official.⁶⁵

If a plaintiff can satisfy the requirements of placing torture at the hands of an individual who was acting under color of law of a foreign nation, the claimant must pass yet another hurdle: an exhaustion of remedies. The TVPA mandates that “[a] court . . . decline to hear a claim . . . if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”⁶⁶ While the exhaustion requirement is an affirmative defense with the defendants bearing the burden of proof,⁶⁷ courts have dismissed cases where the plaintiff failed to adequately allege the exhaustion requirement.⁶⁸

The act of initiating a case under the TVPA serves as *prima facie* evidence of meeting the exhaustion requirement, but a defendant can rebut this presumption with a strong showing that foreign remedies exist.⁶⁹ If the defendant succeeds in making that showing, the burden shifts and the plaintiff would have to prove that those remedies are not available.⁷⁰ “Courts in the United States are familiar with the operation of the exhaustion requirement” and “do not require exhaustion in a foreign forum when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile.”⁷¹ Even if a judgment has been rendered against the plaintiff in a foreign tribunal, that plaintiff may still be permitted to bring a TVPA claim in U.S. courts if they are able to show that they suffered from “[an] unfair[] . . . judicial system, unfair procedures, [or a] lack of competence.”⁷²

Lastly, though the TVPA applies to actions that took place prior to its enactment, TVPA claims are restrained by a ten-year statute of limitations.⁷³ Ultimately, the ten-year period should be

⁶⁴ *Id.* at 1248.

⁶⁵ *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005).

⁶⁶ Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

⁶⁷ *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.5 (9th Cir. 1996) (citing S. REP. NO. 102-249, at 9–10 (1991)).

⁶⁸ *See e.g.*, *Rojas Mamani v. Sanchez Berzain*, 636 F. Supp. 2d 1326, 1331–33 (S.D. Fla. 2009).

⁶⁹ S. REP. NO. 102-249, at 9–10 (1991).

⁷⁰ *Id.* at 10.

⁷¹ *Id.* (footnotes omitted).

⁷² *Id.*

⁷³ Torture Victim Protection Act of 1991 (TVPA), § 2(c), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)); *see e.g.*, *Friedman v. Bayer Corp.*, No. 99 Civ. 3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999).

calculated “with a view toward giving justice to plaintiff’s rights.”⁷⁴ As such, the TVPA allows a plaintiff to toll the statute of limitations any time when the defendant is: (1) absent from the United States; (2) immune from suit; or (3) concealing their identity.⁷⁵ Other instances when tolling is permitted include any time the plaintiff spends incapacitated or imprisoned, when the plaintiff is unable to determine the identity of the torturer,⁷⁶ or during times of war.⁷⁷ Despite the intention of the TVPA, *Bersoum v. Abotaeta*—decided in 2017—demonstrates how the TVPA fails victims of torture.

C. *Bersoum v. Abotaeta*

Bersoum exemplifies a dichotomy between United States policy and practice regarding torture victims. In *Bersoum*, sixty-eight Egyptian citizens brought claims in the United States District Court for the Southern District of New York under the Alien Torts Claims Act, otherwise known as the Alien Tort Statute (ATS), and the TVPA against three Libyan citizens.⁷⁸ Plaintiffs alleged that they had been tortured by the three named Libyan defendants and others working at the hands of the defendants.⁷⁹ It was alleged that the named defendants were currently serving, or had served, as members of the Libyan government.⁸⁰ Plaintiffs alleged that “Defendants and ‘individuals acting under the authority of the Libyan government’ threatened Plaintiffs with rape, electrocution and castration; assaulted them; [and] denied them access to” necessities like food, water, and life-saving medication.⁸¹ Other allegations included that “[p]laintiffs were flogged and forced to strip down naked in outdoor locations in cold temperatures” and “one plaintiff’s thumb was amputated . . . [a]nother plaintiff was shot in the knee.”⁸² The complaint alleged that “[t]o date, these plaintiffs suffer from permanent psychological and mental illness as a result of the torture.”⁸³ The plaintiffs’ prayer for relief included a request for “compensatory damages . . . that is no less than \$5,000,000 per

⁷⁴ S. REP. NO. 102-249, at 11 (1991) (citing *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 428 (1965)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006).

⁷⁸ *Bersoum v. Abotaeta*, No. 16 Civ. 987, 2017 WL 3446819, at *1 (S.D.N.Y. Aug. 10, 2017).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Complaint at 4, *Bersoum v. Abotaeta*, No. 16 Civ. 987, 2017 WL 3446819 (S.D.N.Y. Aug. 10, 2017), ECF No. 1.

⁸³ *Id.*

plaintiff” and “punitive and exemplary damages . . . that is no less than \$15,000,000 per plaintiff.”⁸⁴

Defendants never appeared or responded in the action, and the plaintiffs filed an application for default judgment against the defendants.⁸⁵ In support of their application, the plaintiffs alleged that other sources of remedial action were unavailable because “(1) they were deported to Egypt immediately after their detention, (2) there [were] no adequate and available remedies for them to exhaust in Libya and (3) ‘mounting tensions between Egypt and Libya . . . have led to border closures and diminishing security’” which would make reentry in Libya to seek remedies impossible.⁸⁶ Though the “[p]laintiffs never correctly filed proof of service on the docket,” the “plaintiff[] had the Clerk of Court for the Southern District of New York mail a copy of the Summons and Complaint to each Defendant in Libya,” pursuant the Federal Rules of Civil Procedure.⁸⁷ To support their claim that jurisdiction was proper, the plaintiffs included in the complaint various Libyan connections to the United States.⁸⁸ Among those were that “Ansar al-Sharia [was] blamed for the attack on the US Consulate in Benghazi, Libya,” “[t]he Libyan Mission to the United Nations is located in the State of New York,” and that “[t]he U.S. government has frozen over \$34 billion in ‘property and interests in property’ of the government of Libya . . . in the United States.”⁸⁹

After discussing the standard for deciding whether to enter a default judgment, the court noted that it is required to first “assure itself that it has subject matter jurisdiction over the action.”⁹⁰ The court then stated that it also has the ability to “assure itself that it has personal jurisdiction over the defendant.”⁹¹ By taking on the jurisdictional review, the court laid the groundwork for the eventual dismissal of the case.

The court first dismissed the claims under the ATS because it lacked subject matter jurisdiction.⁹² The ATS does not provide jurisdiction for courts when the alleged actions took place outside of the United States, and because plaintiffs alleged that all conduct took

⁸⁴ *Id.* at 7.

⁸⁵ *Bersoum*, 2017 WL 3446819, at *2.

⁸⁶ *Id.* at *1 (alteration in original) (quoting Complaint, *Bersoum v. Abotaeta*, No. 16 Civ. 987, 2017 WL 3446819 (S.D.N.Y. Aug. 10, 2017), ECF No. 1).

⁸⁷ *Id.* at *2.

⁸⁸ Complaint, *supra* note 82, at 3.

⁸⁹ *Id.*

⁹⁰ *Bersoum v. Abotaeta*, No. 16 Civ. 987, 2017 WL 3446819, at *2 (S.D.N.Y. Aug. 10, 2017).

⁹¹ *Id.* (quoting *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 133 (2d Cir. 2011) (internal quotation marks omitted)).

⁹² *Id.*

place in Libya, the court was bound to dismiss.⁹³ The court then turned to the claims the plaintiffs brought under “the TVPA, which, unlike the ATS, [does have] extraterritorial application.”⁹⁴ Because the TVPA statutorily creates a civil action that can be brought before federal courts under the federal question doctrine,⁹⁵ the court was not able to dismiss as easily as it had for the ATS claims. Instead of undertaking the subject matter analysis, the court raised the issue of personal jurisdiction *sua sponte*.⁹⁶ In order for personal jurisdiction to be proper, the court explained that “three requirements must be met.”⁹⁷ “First, the plaintiff’s service or process upon the defendant must have been procedurally proper. Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective. Third, the exercise of personal jurisdiction must comport with constitutional due process principles.”⁹⁸

On the first issue of whether service was proper, the court explained that it was not.⁹⁹ Plaintiffs failed to prove that the service they purported to complete by way of Rule 4(f)(2) was proper because they did not submit a receipt or other evidence that would have satisfied the court to believe the summons and complaint were actually received by the defendants.¹⁰⁰ Failure to properly serve, the court explained, was one reason the court could not enter the default judgment sought by the plaintiffs.¹⁰¹

Second, the court held that the plaintiffs were not able to establish personal jurisdiction on a statutory basis.¹⁰² To support this conclusion, the court laid out the two types of personal jurisdiction under New York law (applicable here because it was the forum state): general and specific.¹⁰³ After characterizing general jurisdiction as “all-purpose,” the court held that the defendants were not subject to general jurisdiction under New York Civil Practice Law Rules (NY CPLR) § 301¹⁰⁴ because they did not have continuous and systematic contact with New York.¹⁰⁵ Next, the court held that the defendants, according to

⁹³ *Id.* at *2–3.

⁹⁴ *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 746 F.3d 42, 51 (2d Cir. 2014).

⁹⁵ 28 U.S.C. § 1331 (2012).

⁹⁶ *Bersoum*, 2017 WL 3446819, at *3.

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327 (2d Cir. 2016)).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ N.Y. C.P.L.R. § 301 (McKinney’s 2018).

¹⁰⁵ *Bersoum*, 2017 WL 3446819, at *3. “Under the New York courts’ interpretation of section 301, a non-domiciliary subjects herself to personal jurisdiction in New York [for] . . . any cause of action if she is ‘engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of [her] “presence” in this jurisdiction.’” *Beacon Enterprises, Inc. v.*

NY CPLR § 302(a), were not subject to specific personal jurisdiction in New York because “[t]he Complaint does not allege that Defendants transacted any business in New York, committed any tortious acts in or affecting New York, or that Defendants own, use or possess real property in New York.”¹⁰⁶ With personal jurisdiction unavailable under New York law, the court turned to examine personal jurisdiction under federal law.

Though personal jurisdiction had seemingly been defeated by the general and specific analysis noted above,¹⁰⁷ the court correctly analyzed a third possibility for conferring jurisdiction over the defendants. When state statutes fail to establish personal jurisdiction over foreign defendants, Rule 4(k)(2) of the Federal Rules of Civil Procedure acts as a gap filler. The rule states that for claims arising under federal law, “serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and law.”¹⁰⁸ At first read, Rule 4(k)(2) may seem to confer jurisdiction over the Libyan defendants, but the court correctly held that personal jurisdiction was still lacking.¹⁰⁹

In correctly determining that even Rule 4(k)(2) was not enough to confer jurisdiction, the court first laid out the minimum contacts inquiry used to determine whether personal jurisdiction would be consistent with the Constitution’s due process requirements.¹¹⁰ The test asks the court “to consider whether the defendant has sufficient contacts with the forum state to justify the court’s exercise of personal jurisdiction.”¹¹¹ Again, the court was required to examine whether the defendants may be subject to either general or specific jurisdiction in the forum state. For general jurisdiction to lie, the court needed to apply the *Daimler* test¹¹² to determine whether the defendant’s contacts were “so continuous and systematic as to render [it] essentially at home in the forum State.”¹¹³ Because the plaintiffs did not allege that the defendants

Menzies, 715 F.2d 757, 762 (2d. Cir. 1983) (quoting *Simonson v. Int’l Bank*, 251 N.Y.S. 433, 436 (N.Y. 1964) (alterations and emphasis in original)). This means the non-domiciliary must be “doing business” in New York “not occasionally or casually, but with a fair measure of permanence and continuity.” *Id.* (quoting *Laufer v. Ostrow*, 434 N.E.2d 692, 694 (N.Y. 1982)).

¹⁰⁶ *Bersoum*, 2017 WL 3446819, at *4.

¹⁰⁷ *See supra* text accompanying notes 95–105.

¹⁰⁸ FED. R. CIV. P. 4(k)(2).

¹⁰⁹ *Bersoum*, 2017 WL 3446819, at *5.

¹¹⁰ *Id.* at *4.

¹¹¹ *Id.* (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 60 (2d Cir. 2012) (internal quotation marks omitted)).

¹¹² *Daimler AG v. Bauman*, 571 U.S. 117, 133 n.11 (2014).

¹¹³ *Bersoum*, 2017 WL 3446819, at *4 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 133 (2014)).

had any contacts with New York, the court easily found that there was not general personal jurisdiction over the defendants.¹¹⁴

To determine whether there was specific jurisdiction, the court applied the minimum contacts test which “depend[s] on in-state activity *that give rise to the episode-in-suit*.”¹¹⁵ Here, the court held that there was not specific jurisdiction because the alleged tortious activity did not take place in New York and the only contact alleged by the plaintiffs—“that Defendants supported a military group that had previously attacked a United States Consulate”—was insufficient to support a finding of the minimum contacts required for specific jurisdiction.¹¹⁶ Without satisfying the “continuous and systematic” or “minimum contacts” test, asserting personal jurisdiction over these defendants would be a violation of the Constitution.¹¹⁷ After completing the analysis, the court denied the application for default judgment and dismissed the case.¹¹⁸

The decision in *Bersoum v. Abotaeta* cuts two ways. In one sense, the case is a straight-forward example of constitutional due process serving its purpose of ensuring that only defendants who are subject to personal jurisdiction in the United States are haled into court and forced to defend themselves. On the other hand, the case exemplifies a legal hurdle that the TVPA is often unable to overcome, rendering the statute virtually meaningless.

II. PERSONAL JURISDICTION AND LONG ARM STATUTES

A. Overview of General and Specific Jurisdiction

While the TVPA grants federal courts subject matter jurisdiction under the federal question doctrine,¹¹⁹ the issue of personal jurisdiction is much more complicated. Personal jurisdiction falls into two categories: general and specific, with the former being much more difficult for a court to acquire. Put simply, personal jurisdiction, which arises from due process under the Constitution,¹²⁰ refers “to the court’s ability to assert its authority over a party to the litigation.”¹²¹ Therefore, if a court lacks personal jurisdiction over a defendant, it may not render a judgment against that defendant.

¹¹⁴ *Id.*

¹¹⁵ *Id.* (quoting *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 331 (2d Cir. 2016))

¹¹⁶ *Id.* at *5.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Torture Victim Protection Act of 1991 (TVPA), § 2(c), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

¹²⁰ U.S. CONST. amend. V.

¹²¹ 102 AM. JUR. PROOF OF FACTS 3d § 2 (2008).

A court that possesses general personal jurisdiction over a defendant will be able to hear any claim against that defendant.¹²² General jurisdiction over an individual defendant may be established in multiple ways. The most common way that a court will possess general jurisdiction over a defendant is if the court is in the same state as the defendant's domicile.¹²³ "Domicile is a place, usually a person's home, to which a person has a settled connection or to which the law has attached determinative significance."¹²⁴ In the TVPA context, it is unlikely that a plaintiff will ever be able to rely on general jurisdiction via the domicile method because torturers who conduct their illegal activities outside of the United States are unlikely to move to the United States and establish a domicile there.

Courts may also acquire general jurisdiction over a defendant if the defendant is physically present in the forum and service of process is executed against the defendant.¹²⁵ In 1990, the Supreme Court affirmed this method of acquiring personal jurisdiction when it stated, "a State [has] jurisdiction over nonresidents who are physically present in the State. . . . [A]nd that once having acquired jurisdiction over such a person by properly serving him with process, the State could . . . enter judgment against him, no matter how fleeting his visit."¹²⁶ The Court relied on historical roots to justify this method of acquiring jurisdiction, and Justice Scalia noted that it was likely to continue by stating, "the States have overwhelmingly declined to adopt such limitation or abandonment [of transient jurisdiction], evidently not considering it to be progress."¹²⁷ While a plaintiff seeking to assert a TVPA claim may be fortunate enough to establish general jurisdiction over a defendant who is physically present within the United States, such a proposition is, at best, highly unlikely.

The final way that a court may assert general jurisdiction over a defendant is if that defendant has established connections with the forum state that "are so 'continuous and systematic' as to render them essentially at home in the forum State."¹²⁸ But, "the question of whether activities-based general jurisdiction is applicable to individual defendants remains unsolved."¹²⁹ Recently

¹²² *An Overview of the Law of Personal (Adjudicatory) Jurisdiction: The United States Perspective*, CHICAGO-KENT COLL. OF L., <http://www.kentlaw.edu/cyberlaw/docs/rfc/usview.html> [<https://perma.cc/57U5-V8MS>].

¹²³ Emily Eng, Note, *A New Paradigm: Domicile As the Exclusive Basis for the Exercise of General Jurisdiction Over Individual Defendants*, 32 CARDOZO L. REV. 845, 855 (2012).

¹²⁴ *Id.* at 854.

¹²⁵ *Id.* at 855.

¹²⁶ *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610–11 (1990).

¹²⁷ *Id.* at 627.

¹²⁸ *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

¹²⁹ Eng, *supra* note 123 at 862.

though, courts have used the “continuous and systematic” test to assert general jurisdiction over individual defendants.¹³⁰ Regardless of any future Supreme Court rulings on this particular issue, it is again unlikely that a plaintiff suing a defendant under the TVPA will be able to argue that the defendant is subject to general jurisdiction under the “continuous and systematic” test outlined in *Daimler AG v. Bauman* and its progeny.¹³¹

Unlike general jurisdiction, which provides for any type of claim against a defendant once general jurisdiction has been established, “[s]pecific jurisdiction exists when the nonresident defendant’s contacts with the forum state arise from, or are directly related to, the causes of action asserted.”¹³² To determine whether the defendant’s contacts are sufficient enough to satisfy the “minimum contacts” test outlined in *International Shoe Co. v. Washington*, courts consider “the nature and quality of the defendant’s contacts with the forum state; the quantity of those contacts; the relation of the cause of action to the contacts; the interest of the forum state in providing a forum for its residents; and the convenience of the parties.”¹³³ In other words, contacts are sufficient between the defendant and the forum state when the defendant could anticipate being haled into court in the forum state and if the exercise of jurisdiction by the court would fall within the “traditional notions of fair play and substantial justice.”¹³⁴

While due process requires that courts first establish either general or specific jurisdiction, due process also requires that the forum state’s long-arm statute is satisfied before a court in that state can preside over a defendant.¹³⁵ For claims, like the TVPA, that arise under federal law, the federal statute may describe the defendants over whom the statute confers jurisdiction.¹³⁶ If, however, the federal statute is silent as to who the court may render a judgment against, then the court must apply the long-arm statute of the state in which the court is sitting.¹³⁷ For example, a federal claim being heard in the Eastern District for New York, under a federal statute that is silent regarding potential defendants, will require the court to apply the long-arm statute of New York.¹³⁸ In some states, the long-arm statute will extend as far as the Constitution allows, while in other

¹³⁰ *Id.* at 867.

¹³¹ *Daimler AG*, 571 U.S. at 127; *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

¹³² 102 AM. JUR. PROOF OF FACTS § 8 (2008).

¹³³ *Id.* § 5; *see also* *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

¹³⁴ 102 AM. JUR. PROOF OF FACTS § 4 (2008).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *See id.*

states the long-arm statute may limit the federal court's jurisdiction over certain defendants.¹³⁹ Because the TVPA confers subject matter jurisdiction, but is silent on personal jurisdiction, courts must apply the long arm statute of the state where the action was brought.

B. Personal Jurisdiction Over Foreign Defendants Under Rule 4(k)(2)

Despite not residing in the United States, a foreign defendant may still be subject to the jurisdiction of United States courts through the court's exercise of either general or specific jurisdiction. In determining whether either of these types of jurisdiction will lie, courts should undertake the same analyses as outlined above: namely, the "minimum contacts" test and the "continuous and systematic" test. Because a foreign defendant may have contacts with the United States, but fail to meet the requirements of general jurisdiction or a state's long-arm statute, Rule 4(k)(2) of the Federal Rules of Civil Procedure provides a gap-filler.¹⁴⁰ Rule 4(k)(2) provides that in this scenario "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant" so long as "exercising jurisdiction is consistent with the United States Constitution and laws."¹⁴¹ Thus, this gap-filler provides that "notwithstanding a lack of general or specific jurisdiction over a defendant, he may nonetheless be subject to personal jurisdiction based on national contacts."¹⁴²

Three conditions must be met to invoke Rule 4(k)(2). The first requirement, that the claim arise under federal law, can be easily assessed.¹⁴³ Second, the defendant in question must not be subject to the general jurisdiction of any state.¹⁴⁴ Here, there is a circuit split regarding the burden of proof.¹⁴⁵ The United States Court of Appeals for the Seventh Circuit sided with the plaintiff, noting that it would be extremely difficult for her to prove a negative, and required that the defendant identify the state in which general jurisdiction lies if he wishes to use that fact as a defense.¹⁴⁶ The United States Court of Appeals for the First

¹³⁹ *Id.*

¹⁴⁰ Laura Beck Knoll, *Personal Jurisdiction over Maritime Defendants: Daimler, Walden, and Rule 4(k)(2)*, 40 TUL. MAR. L.J. 103, 130 (2015); FED. R. CIV. P. 4(k)(2).

¹⁴¹ FED. R. CIV. P. 4(k)(2).

¹⁴² Knoll, *supra* note 140, at 130.

¹⁴³ FED. R. CIV. P. 4(k)(2).

¹⁴⁴ FED. R. CIV. P. 4(k)(2)(A).

¹⁴⁵ Knoll, *supra* note 140, at 131.

¹⁴⁶ *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001). Judge Easterbook explained that the "constitutional analysis at the federal level is unavoidable but usually simple," while a constitutional analysis for all 50 states would be a misguided burden shift. Instead, a defendant with ample contacts with the United States who wishes to avoid the

Circuit, however, disagreed with this approach because it “threatens to place a defendant in a ‘Catch-22’ situation, forcing it to choose between conceding its potential amenability to suit in federal court . . . or conceding its potential amenability to suit in some identified state court.”¹⁴⁷ Instead of requiring the defendant to plead that it is subject to the general jurisdiction in some state, the First Circuit requires “the plaintiff to make out a prima facie case of all three elements before the burden shifts to the defendant.”¹⁴⁸ This can be achieved by simply certifying that, with the information readily available to him, the defendant cannot be subject to general jurisdiction in any state.¹⁴⁹

Once the plaintiff has made a prima facie case, “the burden shifts to the defendant to produce evidence which, if credited, would show either that one or more specific states exist in which [the defendant] would be subject to suit or that its contacts with the United States are constitutionally insufficient.”¹⁵⁰ As Laura Beck Knoll points out, however, the *Daimler* opinion makes it unlikely that a foreign defendant would be subject to general jurisdiction under the strict “at home” test.¹⁵¹

The last requirement, that exercising jurisdiction over a foreign defendant under Rule 4(k)(2) must be “consistent with the United States Constitution and laws,”¹⁵² can be a difficult analysis. For general jurisdiction, the defendant can be evaluated one of two ways.¹⁵³ First, a court could ask “whether the foreign defendant qualifies as ‘at home’ in the United States by considering their ‘nationwide and worldwide’ contacts as in *Daimler*.”¹⁵⁴ Alternatively, the court could ask “whether the foreign defendant has sufficient minimum contacts with the United States ‘as a whole.’”¹⁵⁵ Beck Knoll argues that a recent decision by the Supreme Court indicates its unwillingness to assert general jurisdiction under Rule 4(k)(2), so the relevant consideration is whether the defendant is subject to specific jurisdiction.¹⁵⁶

application of Rule 4(k)(2) is charged with naming a state where the suit would properly proceed, which would effectively amount to “consent to personal jurisdiction [in that state].” *Id.*

¹⁴⁷ *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d. 30, 41 (1st Cir. 1999).

¹⁴⁸ Knoll, *supra* note 140, at 131 (citing *Swiss Am. Bank*, 191 F.3d at 41).

¹⁴⁹ *Id.* at 132.

¹⁵⁰ *Swiss Am. Bank, Ltd.*, 191 F.3d. at 41.

¹⁵¹ Knoll, *supra* note 140, at 132.

¹⁵² FED. R. CIV. P. 4(k)(2)(B).

¹⁵³ See Knoll, *supra* note 140, at 132.

¹⁵⁴ *Id.* (citing *Daimler AG v. Bauman*, 571 U.S. 1178, 141–42 (2014) (Sotomayor, J., concurring)).

¹⁵⁵ *Id.* (citing *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 107 (1987) (emphasis added)).

¹⁵⁶ *Id.*

With regards to specific jurisdiction, Beck Knoll argues that the Supreme Court's decision in *Walden v. Fiore*, where plaintiffs attempted to challenge a Georgia police officer's cash seizure by bringing suit in Nevada, will further limit the Rule's application.¹⁵⁷ In *Walden*, the Court first considered and rejected the idea that jurisdiction could be created by the contacts between "the plaintiff . . . and the forum State" and instead reiterated that jurisdiction is only proper when the "defendant's suit-related conduct . . . create[s] a substantial connection with the forum state."¹⁵⁸ Second, Justice Thomas, writing for a unanimous Court, explained that the "minimum contacts" test takes into account the defendant's conduct and contacts with the selected forum, and not contacts with those persons residing in the forum.¹⁵⁹ While those contacts "may be intertwined with his transactions or interactions with the plaintiff," the basis for jurisdiction cannot stem from "random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State."¹⁶⁰ Thus, it appears from the Court's reasoning in *Walden* that the prospect of a court attaining jurisdiction over a foreign defendant in the future is becoming less probable, which will only make it harder for TVPA claims to survive.

C. *The Jurisdiction Problem Exemplified: Bersoum v. Abotaeta*

After considering the doctrine of personal jurisdiction, it is clear that the legal reasoning in the *Bersoum* case was correct. The plaintiffs' complaint contained a jurisdictional assertion, but the alleged facts that followed did not meet the legal requirements to establish personal jurisdiction.¹⁶¹ First, the complaint alleged that the three defendants were all Libyan citizens who resided in Libya.¹⁶² As discussed above, the fact that the defendants were non-citizens living abroad made establishing personal jurisdiction particularly challenging for the plaintiffs in *Berosum*.¹⁶³ In an attempt to overcome this jurisdictional challenge, the complaint asserted a number of weak connections that the defendants may have had with the United States.¹⁶⁴ The complaint alleged that "the defendants possessed and exercised command and control over the Libyan paramilitary group ('Ansar al-Sharia') and that

¹⁵⁷ *Walden v. Fiore*, 571 U.S. 277, 279–81 (2014); Knoll, *supra* note 140, at 132.

¹⁵⁸ *Walden*, 571 U.S. at 284.

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 286.

¹⁶¹ Complaint, *supra* note 82, at 2–3.

¹⁶² *Id.* at 2.

¹⁶³ *See supra* Section II.B.

¹⁶⁴ Complaint, *supra* note 82, at 2–3.

“Ansar al-Sharia is . . . blamed for the attack on the US Consulate in Benghazi, Libya.”¹⁶⁵ To bolster this contention, the complaint went on to allege, “[t]he Libyan Defense Ministry, under the leadership of defendants, has ostensibly provided Ansar al-Sharia with funding, arms, and, at best, semi-official authority to conduct its paramilitary activities.”¹⁶⁶

The complaint made two more desperate attempts at establishing personal jurisdiction by stating that “[t]he Libyan Mission to the United Nations is located in the State of New York” and that “[t]he U.S. government has frozen over \$34 billion in ‘property and property interests’ of the government of Libya.”¹⁶⁷ On these facts, the court conducted the “minimum contacts” and “essentially at home in the forum State” tests.¹⁶⁸ As explained above, both tests failed because the complaint did not allege facts sufficient to show defendants had the requisite contacts with New York or the United States as a whole.¹⁶⁹

While the court analyzed the personal jurisdiction in this case correctly, there is still one way that the plaintiffs would have been able to properly assert jurisdiction. If the defendants ever entered the territorial boundaries of the United States, the plaintiffs could personally serve them and, almost magically, personal jurisdiction would be proper, and the defendants would be forced to defend the TVPA claim.¹⁷⁰ This result is arbitrary. Transient jurisdiction is premised on territorial and reciprocity theories.¹⁷¹ In the *Burnham* case, Justice Brennan leaned on the benefits that a person enjoys by being present in a state to justify the state’s power to force that person into court.¹⁷² “By visiting the forum State, a transient defendant[s] . . . health and safety are guaranteed by the State’s police, fire, and emergency medical services; he is free to travel on the State’s roads . . . [and] he likely enjoys the fruits of the State’s economy.”¹⁷³ While this may be true in some circumstances, a defendant who lands at an airport after an international flight has enjoyed few, if any, of those benefits. Still, he is subject to jurisdiction under the territorial theory, but in the case of a typical TVPA suit,

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Bersoum*, 2017 WL 3446819, at *4–5.

¹⁶⁹ *Id.*

¹⁷⁰ *Burnham*, v. Superior Court of Cal., 495 U.S. 604, 610 (1990).

¹⁷¹ *Id.* at 611, 623. “Transient jurisdiction” is “jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State.” *Id.* at 629 n.1 (Brennan, J., concurring).

¹⁷² *Id.* at 637 (Brennan, J., concurring).

¹⁷³ *Id.* 637–38.

the fact that this extremely unlikely event is the only practical way of obtaining jurisdiction cuts against the purpose of the statute itself.

Putting the technicalities of the personal jurisdiction analysis aside, the complaint alleged awful acts at the hands of the defendants.¹⁷⁴ Acts that, if true, make the defendants liable in truth with or without jurisdiction. Plaintiffs were allegedly assaulted and threatened with rape, electrocution, and castration.¹⁷⁵ Without jumping to a verdict, it is unfathomable that defendants like the one's complained of in the *Bersoum* case are able to escape being tried for lack of jurisdiction. The plaintiffs are unlikely to ever find justice in a Libyan court and if the United States and its lawmakers want to hold torturers accountable for their heinous acts, while also deterring future torturous acts, there needs to be a change.

III. POSSIBLE SOLUTIONS TO THE PERSONAL JURISDICTION PROBLEM

A. *Elimination of the Statute*

The least effective way that Congress could address the jurisdictional issues presented by the TVPA is by repealing the TVPA altogether.¹⁷⁶ Currently, plaintiffs are forced to relive their tragic experiences when they, either with or without the help of an attorney, draft their complaint, craft legal and factual arguments, and appear in front of federal judges. Unfortunately, these courageous and resolute plaintiffs often have their claims decided in the same manner: dismissal. Because of the way that federal courts currently undertake the personal jurisdiction analysis, few foreign defendants will ever be subject to the laws of the United States, and plaintiffs will be left feeling revictimized. If Congress chose to repeal the TVPA, at least potential plaintiffs would not have to endure the horrific reality of reliving their past because they would never bring a claim.

While repealing the TVPA is one solution to the problem of establishing personal jurisdiction, it is not a solution that Congress should endorse. The TVPA has the potential to serve an important purpose, and if it were repealed, torturers around the world would continue to escape liability. Without a statute that has extraterritorial application to hold torturers

¹⁷⁴ Complaint, *supra* note 82, at 4.

¹⁷⁵ *Bersoum v. Abotaeta*, No. 16 Civ. 987, 2017 WL 3446819, at *1 (S.D.N.Y. Aug. 10, 2017).

¹⁷⁶ For Congress to repeal the twenty-seven-year-old statute, a proposed bill would need to go through the ordinary lawmaking process. See *How Laws Are Made and How to Research Them*, USA.GOV, <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/6JXG-5LAG>].

accountable for their evil actions, torturers could feel more empowered to carry out heinous acts against innocent people. Furthermore, the repeal of the TVPA, which has the potential of serving justice on human rights violators would not be in symmetry with the anti-torture laws that the United States enforces against its own citizens. The Foreign Relations Authorization Act provides that

[w]hoever outside the United States commits or attempts to commit torture shall be fined . . . or imprisoned not more than [twenty] years, . . . and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.¹⁷⁷

The law also provides that any person who conspires to commit torture is subject to the same penalties, with the exception of death.¹⁷⁸ This law applies to nationals of the United States or if the alleged offender is within the United States.¹⁷⁹ Clearly, the United States has taken a hard stance on torturers within its own border, and to hold those torturers outside of its borders to any less of a standard would be asymmetrical.

B. Refer to an International Court

A better solution than outright repeal of the statute is for district courts in the United States to refer TVPA claims brought before it to an international court. One possible venue for TVPA claims is the International Criminal Court (ICC) based in The Hague, the Netherlands.¹⁸⁰ The court was established in 2002 by the Rome Statute, which has been signed by 120 of the world's states.¹⁸¹ As a matter of law, the tribunal is a court of last resort and will only try a case "when national courts are unable or unwilling [to] keep their responsibility to prosecute atrocities at home."¹⁸² To that end, the court operates on an opt-in basis and "states must choose to accept its jurisdiction and agree to enforce its law, cooperate with its decisions, and provide it with the political support for its effective functioning."¹⁸³ One possible reason that states may choose to avoid signing the Rome Statute

¹⁷⁷ Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506(a), 108 Stat. 382, 463 (codified as amended at 18 U.S.C. § 2340A(a) (2012)).

¹⁷⁸ 18 U.S.C. § 2340A(c).

¹⁷⁹ *Id.* § 2340A(b).

¹⁸⁰ *ICC Basics*, COAL. FOR THE INT'L CRIMINAL COURT, <http://www.coalitionfortheicc.org/explore/icc-basics> [https://perma.cc/FVM7-MG38].

¹⁸¹ Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 91-92; *ICC Basics*, *supra* note 180.

¹⁸² *ICC Basics*, *supra* note 180.

¹⁸³ *Id.*

is that “[i]t expressly removes immunities for state officials including heads of state or government.”¹⁸⁴

As it is currently constructed, the ICC has a limited reach, and, therefore, its ability to handle a TVPA claim may be handcuffed. First, the ICC is a criminal court, but the TVPA only provides for a civil action brought against individuals for money damages.¹⁸⁵ The ICC currently only tries individuals for genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁸⁶ Victims of these crimes are able to proceed in the prosecution of their offenders and may “receive reparations for harm suffered.”¹⁸⁷ The ICC, however, does not provide for the types of torture claims that are the subject of the TVPA, unless those types of claims are widespread enough to be included within the ICC’s definition of “crimes against humanity.”¹⁸⁸ In order to be considered a “crime against humanity” under the ICC requirement, the crime must be: (1) an attack directed against civilian populations; (2) widespread or systematic; (3) pursuant to or in furtherance of a state or organizational policy; (4) with knowledge of the attack by the perpetrator.¹⁸⁹

The biggest hurdle for referring a TVPA claim to the ICC would be the requirement that states opt-in to accept its jurisdiction, which includes only the specified crimes “committed either (I) on the territory of a state party to the Rome Statute; or (II) by a national of a state party to the Rome Statute, irrespective of the location.”¹⁹⁰ Glaringly, nations like Libya, a state not known for adhering to the rule of law, did not sign the Rome Statute, making the ICC obsolete in a case like *Bersoum*.¹⁹¹ Perhaps surprisingly, the United States has also not signed the Rome Statute, so a referral from a United States district court to the ICC would be logically contradictory.¹⁹²

¹⁸⁴ *Id.*

¹⁸⁵ *ICC Crimes*, COAL. FOR THE INT’L CRIMINAL COURT <http://www.coalitionfortheicc.org/explore/icc-crimes> [<https://perma.cc/9ALM-ETCH>]; Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

¹⁸⁶ Rome Statute, *supra* note 181, at art 5, 2187 U.N.T.S. at 92.

¹⁸⁷ *ICC Basics*, *supra* note 180.

¹⁸⁸ *Id.*

¹⁸⁹ Rome Statute, *supra* note 181, at art 7, 2187 U.N.T.S. at 93–94; *ICC Crimes*, *supra* note 185.

¹⁹⁰ *ICC Basics*, *supra* note 180; *see also* AMNESTY INT’L UK, LIBYA: RULE OF LAW OR RULE OF MILITIAS? 5–11 (2012) https://www.amnestyusa.org/wp-content/uploads/2017/04/2012_-_007_-_rule_of_law_or_militias_formatted.pdf [<https://perma.cc/X7C5-5FDV>] (recounting human rights abuses and violations in Libya perpetrated by armed militias in contravention of the rule of law).

¹⁹¹ *The States Parties to the Rome Statute*, INT’L CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#L [<https://perma.cc/M834-FVGR>].

¹⁹² *Id.*

If the ICC's shortcomings are ignored and it is assumed that a TVPA claim is referable, a potential plaintiff must consider the prudence of such a referral. First, it is important to reiterate that the ICC is strictly a criminal court.¹⁹³ Second, the ICC will only have jurisdiction over alleged crimes if (1) the crime is referred to the court by a state party; (2) the UN Security Council makes a referral; or (3) a preliminary examination is launched by the ICC prosecutor.¹⁹⁴ While a transfer from a district court is not a scenario in which the ICC would have jurisdiction, this note contemplates such a scenario and applies established case law surrounding the issue of forum non conveniens for the consideration of such a transfer.

The Supreme Court has held that, despite "a strong presumption in favor of the plaintiff's choice of forum,"¹⁹⁵ courts should balance the public and private factors to determine if a transfer on forum non conveniens grounds is warranted.¹⁹⁶ Courts consider public factors such as congestion, deciding a localized controversy at home, the forum's familiarity with applying the governing law, the potential for conflict when applying foreign law, and the burdens of jury duty.¹⁹⁷ Applied to the *Bersoum* case, the public factors weigh against transferring the claim to a foreign court.¹⁹⁸ TVPA claims arise under U.S. federal law, which district courts are seasoned in applying and the potential for a conflict of law is eliminated. Moreover, TVPA claims, unlike fair labor actions or habeas petitions,¹⁹⁹ are not numerous enough to cause congestion in the courts or severely burden juries.²⁰⁰

Though the public factors weigh against a transfer, private factors must also be analyzed. The Supreme Court outlined the following private factors for consideration: (1) the "ease of access to sources of proof"; (2) the availability of compulsory process and costs of producing witnesses; (3) previewing the premises; and (4) "all other practical problems," such as joining a defendant.²⁰¹ Applied to the facts from *Bersoum*, the private factors, like the public factors, weigh against transferring the case to an international court like the ICC.

¹⁹³ *ICC Basics*, *supra* note 180.

¹⁹⁴ *How the ICC Works*, ABA-ICC PROJECT <https://how-the-icc-works.aba-icc.org/> [<https://perma.cc/5N5U-SJQ5>].

¹⁹⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

¹⁹⁶ *Id.* at 257.

¹⁹⁷ *Id.* at 241 n.6.

¹⁹⁸ *See supra* Section III.B.

¹⁹⁹ Lydia DePillis, *Why Wage and Hour Litigation is Skyrocketing*, WASH. POST (Nov. 25, 2015) https://www.washingtonpost.com/news/wonk/wp/2015/11/25/people-are-suing-more-than-ever-over-wages-and-hours/?utm_term=.fe46eb107671 [<https://perma.cc/P3XX-X98S>].

²⁰⁰ The Supreme Court has only addressed the TVPA four times. *Human Rights*, *supra* note 43, at III.E-27.

²⁰¹ *Piper Aircraft*, 454 U.S. at 241 n.6 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

Because the ICC is based in The Hague, the Netherlands, access to proof and witness related matters are arguably just as costly and burdensome as they would be for a court in the United States. Similarly, previewing the premises where the conduct took place and joining a defendant are just as difficult for the ICC as they would be for a U.S. district court. Even if the court were to decide on transferring the claim, the United States would not be able to ensure that the international court is carrying out Congress' intent. With a transfer to the ICC blocked from both legal and practical standpoints, it is up to the Supreme Court to ensure that the TVPA is not toothless.

IV. JUDICIAL SOLUTIONS TO THE JURISDICTION PROBLEM

A. *Apply Burnham Philosophies to Foreign Defendants*

There are questions about whether non-citizens should receive the benefits of U.S. laws without also bearing the burden of those laws. In essence, U.S. law protects TVPA defendants by preventing their appearance in court while also attempting to serve justice on those same wrongdoers.²⁰² Despite their non-citizen status, foreign TVPA defendants are currently able to skirt Congress' specific intent and unjustly avoid even the prospect of liability by citing the Constitution's due process limits on personal jurisdiction.²⁰³ The philosophies of Justice Brennan's concurrence in the *Burnham* decision should be extended to include foreign defendants enjoying the protections of the Constitution.²⁰⁴ Like the person who steps into a state and is protected by that state's police and fire department and is therefore subject to personal jurisdiction,²⁰⁵ the alleged TVPA offender who is constantly protected by the U.S. Constitution should be subject to personal jurisdiction in the United States. By counterbalancing the protections a foreigner receives under the Constitution with the proposed catchall provision that extends personal jurisdiction over human rights violators, citizens of all nations would be able to effectively pursue suits against torturers.

²⁰² See discussion *supra* Sections II.A, II.B.

²⁰³ Daniel Fisher, *Does the Constitution Protect Non-Citizens? Judges Say Yes*, FORBES (Jan. 30, 2017, 12:08 PM), <https://www.forbes.com/sites/danielfisher/2017/01/30/does-the-constitution-protect-non-citizens-judges-say-yes/#667c8d54f1de> [https://perma.cc/EV5C-NS99].

²⁰⁴ *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 637–38 (1990) (Brennan, J., concurring).

²⁰⁵ *Id.* at 637–38.

B. *Broaden the Definition of “Contacts”*

A court hearing a TVPA claim against a foreign defendant may have more traditional means of asserting personal jurisdiction. While it is unlikely that a foreign defendant will ever be “essentially at home in the forum state”—simply because they live in another country that is their true home and the TVPA does not apply against corporations—an individual defendant may pass the “minimum contacts” test depending on how broadly the court views those contacts. While the minimum contacts test was originally set out in *International Shoe*,²⁰⁶ the contacts considered by courts has been ever-evolving. In *McGee v. International Life Insurance Co.*, for example, the Supreme Court held that business contacts of the defendant were enough to establish jurisdiction because the business was related to the suit.²⁰⁷ In the *Burger King Corp. v. Rudzewicz* case, the Court held that a state may have jurisdiction over a defendant who has never even entered that state if the defendant purposefully directs his activities at the state.²⁰⁸ Similarly, in the *Calder v. Jones* case, from which the *Calder* effects test grew,²⁰⁹ the Court held that a defendant may be haled into a state’s courts if the defendant acted intentionally to cause harm in the forum state.²¹⁰ As summarized in *Walden*, “[t]he [Due Process] inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant ‘focuses on the relationship among the defendant, the forum, and the litigation.’”²¹¹

Applying these principles to the facts of *Bersoum*, it may be possible to assert personal jurisdiction over foreigners like the Libyan defendants. First, like the business contacts from *McGee*,²¹² it is likely that the Libyan defendants, all of whom worked for the Libyan government, are connected, either by way of wages, investments, or funding, with the monies held by the Libyan government within the United States.²¹³ Similarly, any “individual who acts under the actual or apparent authority, or color of law, of any foreign nation” will have contacts with the United States by way of that government’s property,

²⁰⁶ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁰⁷ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957).

²⁰⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985).

²⁰⁹ *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

²¹⁰ *Id.* at 789–90.

²¹¹ *Walden v. Fiore*, 571 U.S. 277, 283–84 (2014) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984)).

²¹² *McGee*, 355 U.S. at 223.

²¹³ David S. Cohen, *U.S. Freezes At Least \$30 Billion in Libyan Assets*, U.S. DEP’T OF THE TREASURY (Mar. 1, 2011), [https://www.treasury.gov/connect/blog/Pages/US-Freezes-At-Least-\\$30-Billion-in-Libyan-Assets.aspx](https://www.treasury.gov/connect/blog/Pages/US-Freezes-At-Least-$30-Billion-in-Libyan-Assets.aspx) [<https://perma.cc/CXM5-E3HY>].

money or otherwise, within the United States.²¹⁴ If courts are willing to make the jump from the individual who commits the torture to the nation that funds and supports the torture, then personal jurisdiction may be proper on account of those “contacts” that the foreign nation has with the United States.²¹⁵ Furthermore, from a damages perspective, a foreign government’s assets located within the United States should be available to satisfy judgments against otherwise judgment-proof defendants. If courts were willing to connect the offenders with their supporters, the TVPA would regain its bite and fulfill its legislative purpose.

Courts could also attempt to satisfy the minimum contacts test against a TVPA defendant by considering the purpose of torture and its effects on the United States. After conducting an analysis under the *Burger King* and *Calder* framework, the United States Court of Appeals for the District of Columbia, in *Mwani v. bin Laden*, held that foreign defendants were subject to personal jurisdiction because their actions were “purposefully directed . . . at residents of the United States.”²¹⁶ The court reasoned that the bombing at issue was intended to “cause pain and sow terror in . . . the United States.”²¹⁷ If TVPA claimants are able to allege facts that the actions of defendants were directed at harming the United States and its residents, then perhaps minimum contacts would be satisfied.

There is an argument to be made that every instance of human rights violations, including torture, is an act directed against democracy and capitalism, two cornerstones of a free and civilized society.²¹⁸ More concretely, extrajudicial killings, also protected against by the TVPA, allows for an easier “targeting” analysis. The theoretical plaintiff who lives in the United States and loses a loved

²¹⁴ Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)).

²¹⁵ In 2017, a court found that the U.S. government was permitted to seize an Iranian controlled building in Manhattan to complete a “terrorism-related civil forfeiture.” The sale of the building would be used to pay a portion of the damages due to victims’ families from the September 11th attacks. Vivian Wang, *Manhattan Skyscraper Linked to Iran Can Be Seized by U.S., Jury Finds*, N.Y. TIMES (June 29, 2017), https://www.nytimes.com/2017/06/29/nyregion/650-fifth-avenue-iran-terrorism.html?_r=0 [<https://perma.cc/2STD-Z74L>]. Similarly, the New York Court of Appeals held in *Rasheed Al Rushaid v. Pictet & Cie* “that the ‘[r]epeated, deliberate use [of a New York correspondent account] that is approved by the foreign bank on behalf and for the benefit of a customer’ satisfied” New York’s long-arm statute, establishing personal jurisdiction. *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 327 (2016); Jamie L. Boucher et al., *New York Court of Appeals Finds Repeated, Deliberate Use of Correspondent Account Sufficient to Establish Personal Jurisdiction Over Non-U.S. Bank*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 5, 2016) (alterations in original), <https://www.skadden.com/insights/publications/2016/12/new-york-court-of-appeals-finds-repeated-deliberat> [<https://perma.cc/N6TY-GEC7>].

²¹⁶ *Mwani v. bin Laden*, 417 F.3d 1, 13 (D.C. Cir. 2005) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted)).

²¹⁷ *Id.*

²¹⁸ Edward Younkins, *The Conceptual Foundations of Democratic Capitalism*, SOCIAL CRITIC (1998) <http://www.quebecoislibre.org/younkins16.htm> [<https://perma.cc/H8BN-BUN3>].

one at the hands of an extrajudicial killing, should have an easy time establishing jurisdiction under the *Calder* effects test. The defendant in that instance should be haled into court because his actions were directed at the family member residing in the United States.

C. *Rewrite Rule 4(k)(2)*

An explicit catchall in the Federal Rules of Civil Procedure to prevent torturers from slipping through jurisdictional cracks would be better than both of the above approaches. The Judicial Conference should propose, and the Supreme Court should approve, an amendment to Rule 4(k)(2) of the Federal Rules of Civil Procedure because it is the only way to ensure that the TVPA's aim be fulfilled.²¹⁹ The Judicial Conference, which is comprised of chief judges from each circuit, a district judge from each regional circuit, and the Chief Judge of the Court of International Trade, uses a Standing Committee and advisory rules committees to “‘carry on a continuous study of the operation and effect’ of the federal rules.”²²⁰ When reviewing the rules and determining the need for amendments, the Judicial Conference is responsible for promoting: “simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”²²¹

If the Advisory Committee on Civil Rules were to examine the chilling impact that Rule 4(k)(2) has on TVPA claims, they could draft a contemplated amendment that would better align with the goals of the rules. The draft amendment would first be open to “comments from the bench, bar, and general public.”²²² After considering the comments, the proposed, and possibly revised, amendment would then be reviewed by the Standing Committee, who should recommend the changes be adopted by Supreme Court.²²³ The Supreme Court should then review and promulgate the amended rule into effect by order.²²⁴

²¹⁹ *How the Rulemaking Process Works*, U.S. COURTS <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [https://perma.cc/MZ7Q-ZXSZ]. Congress delegated rulemaking authority for federal courts to the federal judiciary through the Rules Enabling Act. Rules Enabling Act of 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2012)).

²²⁰ *How the Rulemaking Process Works*, *supra* note 219 (quoting 28 U.S.C. § 331 (2012)).

²²¹ *Overview for the Bench, Bar, and Public*, US COURTS <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [https://perma.cc/TB4V-HQJ5].

²²² *How the Rulemaking Process Works*, *supra* note 219.

²²³ *Id.*

²²⁴ *Id.* Though Congress has the ability to reject the amendment through new legislation or defer its effective date, it should take no action, allowing the amended Rule 4(k)(2) to become effective the same year it was approved by the Court. *Id.*

By amending Rule 4(k)(2) to create a constitutional carve out allowing for human rights violators to be brought before U.S. courts, the Supreme Court of the United States could solve the jurisdictional problem that the TVPA currently presents. Without an amendment to the Rules, courts are unlikely to change their current jurisdictional analysis under both the theory of reciprocity and “minimum contacts.” If Rule 4(k)(2) were to remain unchanged, courts will adhere to the status quo, and the United States will continue to allow human rights violators to escape liability for conduct that falls squarely within an internationally accepted definition of torture.

Currently, the language of Rule 4(k)(2) of the Federal Rules may already trick the casual reader into thinking that it is already possible to bring a foreigner before a federal district court because it states: “serving a summons . . . establishes personal jurisdiction over a defendant if . . . the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction.”²²⁵ However, the next subsection of the rule prevents defendants like those in *Bersoum* from being haled into court by providing that in order for jurisdiction to be proper, it must be “consistent with the United States Constitution and laws.”²²⁶ It is ultimately this particular subsection that prevents defendants in TVPA claims from being tried in U.S. courts unless those defendants pass the “minimum contacts” or “essentially at home in the forum state” tests.²²⁷ An amendment to the language of Rule 4(k)(2) that specifically confers personal jurisdiction over individuals who are alleged to have committed human rights violations means the United States would finally be able to fully realize the purpose of the TVPA.

The Advisory Committee and Standing Committee, when drafting the amendment to Rule 4(k)(2), must be careful to remember the deficiencies of Rule 4(k)(2) in its current form. By explicitly stating, then, that human rights violators are subject to personal jurisdiction of any federal district court regardless of the constraint put on foreign defendants by Rule 4(k)(2)(B), the TVPA would regain its bite. The amended Rule would make clear for courts that they need not undertake the minimum contacts analysis. Instead, a defendant who is quickly and automatically within the court’s jurisdiction will no longer be able to rely on the procedural roadblock, discovery will proceed, and perhaps plaintiffs will be a

²²⁵ FED. R. CIV. P. 4(k)(2).

²²⁶ *Id.*

²²⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

step closer to feeling a sense of justice.²²⁸ Additionally, torturers will be deterred from carrying out their evil conduct, and would face considerable monetary consequences if found liable in court.²²⁹ Lastly, by permitting fact discovery to proceed, courts could initiate a “freeze and seize,”²³⁰ so that plaintiffs who prevail on their claims would receive not only a favorable judgment, but also a damages award designed to compensate them for their traumatic experiences.

CONCLUSION

Currently, the TVPA falls short of meeting its goal of holding human rights violators around the world accountable. When considering whether to pass the statute, Congress highlighted that the TVPA was designed to address acts that “violate standards accepted by virtually every nation” and codified what had otherwise “assumed the status of customary international law.”²³¹ Unfortunately, the TVPA has not been successful in its attempt to carry out justice because U.S. courts rarely find that they have personal jurisdiction over foreign defendants.²³² Because courts lack jurisdiction, these defendants are not only free from answering for their conduct, but are also undeterred from committing similar evil acts in the future.²³³

Congress can address the TVPA’s deficiencies in a variety of ways. First, it could choose to repeal the TVPA altogether. Repealing would have the same effect as allowing the TVPA to continue without an expansion of personal jurisdiction. While torturers would not be deterred and would not face legal consequences, victims of torture would not be revictimized by believing that they could prevail on a TVPA claim only to find out later that their time, effort, and money in securing a lawyer and filing a claim were defeated on personal jurisdiction grounds. Alternatively, courts could expand their personal jurisdiction analyses to meet the demands of

²²⁸ NAT’L CRIME VICTIM BAR ASS’N, CIVIL JUSTICE FOR VICTIMS OF CRIME 4–5 (2001), [https://victimsofcrime.org/docs/Public%20Folders/Civil%20Justice%20-%20FINAL%20\(mon-book\).pdf?sfvrsn=0](https://victimsofcrime.org/docs/Public%20Folders/Civil%20Justice%20-%20FINAL%20(mon-book).pdf?sfvrsn=0) [<https://perma.cc/Y4HZ-8PYS>].

²²⁹ The TVPA provides for the recovery of damages from defendants found liable for torture. Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 note (2012)); *see, e.g.*, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1360 (N.D. Ga. 2002) (where defendant was ordered to pay each of four plaintiffs ten million dollars in compensatory damages and twenty-five million dollars in punitive damages).

²³⁰ *See* Stephen Moskowitz, *Freeze and Seize Law – California*, TAX LAWYER BLOG (Oct. 22, 2010) <https://moskowitzllp.com/freeze-seize-law-california/> [<https://perma.cc/LXM5-4EWJ>] (discussing cases where California’s “freeze and seize” law was used to ensure restitution payments).

²³¹ S. REP. NO. 102-249, at 3 (1991).

²³² *See supra* Section II.B.

²³³ *See supra* Section II.B.

globalization. By allowing more attenuated contacts or viewing torture and extrajudicial killings as an attack on the United States, the courts could more frequently exercise jurisdiction over foreign defendants. Still, this solution relies on a theoretical approach that courts have been reluctant to endorse and could allow TVPA violators to escape any liability.

The clearest and most efficient way to cure the challenges in succeeding on a TVPA claim would be for the Supreme Court to explicitly allow for personal jurisdiction over foreign defendants who commit human rights violations by adopting an amended Rule 4(k)(2). By expanding the Rule to hale foreign defendants into court, fact discovery could proceed, evidence of international crimes could be brought to light, and plaintiffs may well force their offenders to face justice.

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